

## Chapter 2 VETERAN'S RIGHTS, RESPONSIBILITIES AND DUE PROCESS

- 2.01 Introduction
- 2.02 References and Resources
- 2.03 Providing General Notice of Rights and Responsibilities
- 2.04 Requirements Regarding the Privacy Act Statement and Freedom of Information Act (FOIA)
  - a. Privacy Act Statement
  - b. FOIA
  - c. Requesting Records Under FOIA
  - d. Responding to a FOIA Request
- 2.05 Protection of Privacy and Release of Information
  - a. Protection of Privacy
  - b. Release of Information to Outside Entities
  - c. Review of Sensitive Information in a Veteran's Records
  - d. Rehabilitation Service Providers
  - e. Release of Information to Potential Employers
- 2.06 Procedures for Providing Due Process
  - a. Definition of Terms
  - b. Entitlement to Notification
  - c. General Notification Requirements for an Adverse Action or a Proposed Adverse Action
  - d. Types of Notification
  - e. Adverse Actions that Do Not Require Prior Notification
    - 1. Subsistence Allowance Awards
    - 2. Scheduled Interruption
    - 3. Scheduled Rehabilitation
  - f. Adverse Actions that Require Prior Notification
    - 1. Benefit Changes Requiring a Notice of Proposed Adverse Action
    - 2. Procedures for Providing Notices of Proposed Adverse Action
    - 3. Due Process Period
- 2.07 Veterans Claims Assistance Act of 2000, Public Law 106-475
  - a. Background and Description of Public Law 106-475

- b. Elements of the Veterans Claims Assistance Act (VCAA) Notification Letter

2.08 Duty to Assist Criteria

- a. Duty to Obtain Relevant Federal Records
- b. Duty to Obtain Relevant Non-Federal Records
- c. Refrain from or Discontinue Providing Assistance

Appendix O. VA Forms

## Chapter 2 VETERANS' RIGHTS, RESPONSIBILITIES AND DUE PROCESS

### 2.01 Introduction

The scope of this chapter includes a description of a Veteran's rights and responsibilities, information on providing notification of rights to a Veteran, due process, adverse action notification, award action and duty to assist. This chapter also contains the statutory and regulatory provisions related to a Veteran's rights, responsibilities and due process under the Vocational Rehabilitation and Employment (VR&E) program.

### 2.02 References and Resources

Laws:	Freedom of Information Act (FOIA) Veterans Claims Assistance Act of 2000 Public Law (Pub. L.) 106-475 38 United States Code (U.S.C.) 5701
Regulations:	38 Code of Federal Regulations (CFR) 3.103(b)(2) 38 CFR 21.32(b)(2) 38 CFR 21.33 38 CFR 21.324 38 CFR 21.324(b) 38 CFR 21.420
Resource:	Department of Veterans Affairs Freedom of Information Act (FOIA) Requester's Reference Guide
VA Forms (VAF):	VAF 21-4142, Authorization and Consent To Release Information to the Department Of Veterans Affairs VAF 28-1902b, Counseling Record-Narrative Report VAF 28-1902n, Counseling Record-Narrative Record (Supplemental Sheet) VAF 28-1905d, Special Report of Training VAF 28-8739a, Protection of Privacy Information Statement VAF 28-0800, Vocational Rehabilitation and Employment (VR&E) Program Orientation VAF 4107, Your Rights to Appeal Our Decision VAF 3288, Request for and Consent to Release of Information from Claimant's Records
Websites:	<a href="http://www.foia.va.gov/FOIA_Fee_info.asp">www.foia.va.gov/FOIA_Fee_info.asp</a> <a href="http://www.foia.va.gov/FOIA_Offices.asp">www.foia.va.gov/FOIA_Offices.asp</a>

www.foia.va.gov

## 2.03 Providing General Notice of Rights and Responsibilities

A Vocational Rehabilitation Counselor (VRC) or Employment Coordinator (EC) (also referred to as case managers) is responsible for providing the general notice of rights and responsibilities to a Veteran.

a. During the initial interview, the VRC or EC will take the following actions:

1. Inform the Veteran of his/her rights and responsibilities.
2. Provide the Veteran with a copy of the signed VAF 28-0800.
3. Inform the Veteran of current or future determinations that may affect his/her receipt of benefits and services.

b. A Veteran requesting or receiving benefits or services under the following chapters is entitled to notification:

- Chapter 18, Benefits for Children of Vietnam Veterans and Certain Other Veterans
- Chapter 31, Vocational Rehabilitation and Employment
- Chapter 35, Survivors' and Dependents' Educational Assistance

c. Definition of Terms

Whenever the term "Veteran" is used in the discussion of the rehabilitation planning process, this term also includes a court-appointed legal custodian or guardian of the Veteran. Similarly, the term "child" or "dependent" includes a parent of a minor child or a court-appointed legal guardian or custodian.

A determination of incompetence solely for the purpose of appointing a fiduciary to handle a Veteran's or an adult dependent's VA payments does not by itself mean that the Veteran or adult dependent is not competent to apply for and receive VR&E benefits. On the other hand, if a court with proper jurisdiction appoints a guardian or custodian, then the case manager must develop the rehabilitation plan in cooperation with the guardian or custodian. Similarly, a parent must assist in the development of and sign any plan developed for a minor child.

## 2.04 Requirements Regarding the Privacy Act Statement and Freedom of Information Act (FOIA)

### a. Privacy Act Statement

During the initial meeting, the case manager will provide VAF 28-8739a (see Appendix O, VA Forms), explain its purpose and obtain an appropriate signature from the Veteran and/or guardian. The case manager must file VAF 28-8739a on the right side of the Counseling/Evaluation/Rehabilitation (CER) folder and ensure the Veteran and/or guardian receives a signed copy of the form.

### b. FOIA

FOIA is a federal law that gives United States citizens the right to access government information upon request. It is the VA's policy to release information to the fullest extent of the law provided there is no foreseeable harm associated with the release.

### c. Requesting Records Under FOIA

Individuals may be advised to request VA records under FOIA by taking the following steps:

1. Go to the VA FOIA website at [www.foia.va.gov](http://www.foia.va.gov).
2. Ensure the request is in writing and signed by the person submitting the request.
3. Reasonably describe the records requested so that they may be located with a reasonable amount of effort.
4. State the requestor's willingness to pay applicable fees or provide a justification to support a fee waiver. For information on fees, see [www.foia.va.gov/FOIA\\_Fee\\_info.asp](http://www.foia.va.gov/FOIA_Fee_info.asp).
5. Include a daytime telephone number with the request.

The VA has a decentralized system for handling FOIA requests. All FOIA requests should be addressed directly to any of the approximately 400 geographically dispersed components that may maintain the records the requestor is seeking.

If the requestor knows the office that maintains the records he/she is

seeking, ask him/her to send the request to that office or contact the VA Central Office FOIA/Privacy Act Officer at [www.foia.va.gov/FOIA\\_Offices.asp](http://www.foia.va.gov/FOIA_Offices.asp) for the custodian of the record.

d. Responding to a FOIA Request

After receiving the FOIA request, the Regional Office FOIA officer will request the Veteran's file from VR&E. VR&E will request clarification from the FOIA officer regarding whether the entire file is needed or just certain information from it. Once that is clarified, the requested information/documents will be taken to the FOIA office. Before providing the information to the FOIA officer, VR&E will make a duplicate copy of file information to continue providing appropriate services to the Veteran.

2.05 Protection of Privacy and Release of Information

a. Protection of Privacy

All files, records, reports and other documents pertaining to any claim filed with the VA are confidential and privileged. The information in the Veteran's CER folder is developed and maintained to assist the Veteran in obtaining and maintaining suitable employment or Independent Living (IL) services. This information may not be communicated to others nor may others use it, except in the following circumstances:

- To assist the Veteran in completing a comprehensive initial evaluation
- To assist the Veteran in pursuing his/her rehabilitation program
- To assist the Veteran in securing and adjusting to employment or, on rare occasion, to provide information to protect the Veteran or others from harm

b. Release of Information to Outside Entities

The case manager may release information regarding a Veteran's disability or rehabilitation program to a vendor or establishment when all of the following conditions are met:

- The case manager asked the vendor or establishment to provide services to the Veteran
- The information is directly related to the services authorized to the Veteran

- The Veteran authorized the release of information in writing
- All Personal Identification Information must be redacted before providing information except where the Social Security Number is used as a student's ID number

The Veteran may provide a signed written authorization or utilize VAF 3288 (Appendix O, VA Forms). The authorization will remain in effect for the duration of the Veteran's rehabilitation program unless otherwise indicated.

Note: The case manager must obtain a separate signed release of information prior to releasing information to organizations or individuals not directly involved in providing rehabilitation services.

c. Review of Sensitive Information in a Veteran's Record

Sensitive information is defined as information that if disclosed to the individual, may have a serious adverse effect on his/her mental or physical health. Such information may require explanation or interpretation by an intermediary or assistance in accepting and assimilating the information in order to preclude an adverse impact on the individual's health.

When individuals request access to their records (which includes medical, social and/or psychological information), the VRC must review the record to determine whether the medical and/or psychological information could cause harm to the individual. There will be instances where physical and mental health notes are placed in the CER; however, Compensation and Pension Record Interchange (CAPRI) information should not be in the CER per current Veterans Benefits Administration (VBA) policy. If, upon review, the VRC concludes that the information may cause harm, the request and related documents must be referred back to the designated VA medical provider, private physician or mental health provider who prepared the information to determine if the record can be disclosed directly to the individual.

Where denial of a request for access is made, the VRC must fully document in a Corporate WINRS (CWINRS) Case Management System note the justification for making the denial. The note must specifically state that the physical or mental health information was referred back to the VA medical provider, private physician or mental health provider that prepared the information to determine if it can be provided and that the information was removed from the CER prior to providing the Veteran access to the record.

d. Rehabilitation Service Providers

When a case manager releases information to vendors or establishments providing rehabilitation services, he/she must include a written notice that the information is strictly confidential, is furnished solely for the purpose of enabling the vendor or establishment to assist the Veteran in his/her rehabilitation program and cannot be released to other parties. The Veteran does not have to sign a release when services are being contracted out. A release is required when a referral is made to a Disabled Veterans' Outreach Program (DVOP) specialist.

e. Release of Information to Potential Employers

VA and other rehabilitation service providers should release to employers only information that they need to know and only with a signed release from the individual. Employers may not ask employment applicants about the existence, nature or severity of a disability. Applicants may be asked about their ability to perform specific functions for that occupation. An employment offer may be conditional pending the results of a medical examination, but only if the examination is required for all employees considering a similar position or occupation.

2.06 Procedures for Providing Due Process

a. Definition of Terms

1. Due process

Due process is defined as the administration of VA benefits that requires the case manager inform the beneficiary of a proposed adverse action that could reduce, deny or terminate benefits and provide the beneficiary with the opportunity to provide additional evidence to contest the action and/or request a meeting with his/her case manager

2. Adverse action

An action that denies benefits and/or services, reduces or otherwise lessens benefits or services or terminates benefits is called an adverse action.

b. Entitlement to Notification

The following parties are entitled to notification of any decision made by the VA that affects the payment of benefits or the granting of relief:



- Beneficiaries
  - Guardians of minor beneficiaries
  - Fiduciaries of a Veteran rated or deemed incompetent
  - Beneficiaries' designated representatives
- c. General Notification Requirements for an Adverse Action or a Proposed Adverse Action

When feasible, the case manager will meet with the Veteran to discuss any adverse actions. However, this personal discussion does not replace the written notification to the Veteran as required by 38 CFR 21.420.

Every notification letter for an adverse action or a proposed adverse action must include the following elements:

- Nature of the decision
- Effective date of the decision
- Reason(s) for the decision
- Evidence that was considered and the right of the Veteran to present new evidence, request a personal meeting and have representation
- Veteran's right to present new evidence, request a personal meeting and have representation within a 30-day period from the date of the notification letter

In addition, the case manager must send a VAF 4107 (see Appendix O, VA Forms) with the notice of proposed adverse action and with the final notice of adverse action.

- d. Types of Notification
1. The two types of due process notification used to inform a beneficiary of a change apply to the following:
    - Changes that do not require notification prior to taking an adverse action

- Changes that require notification prior to taking an adverse action
2. The notification of an adverse action or proposed adverse action is determined by the source of the information, as follows:

- (a) Third party

A notification of a proposed adverse action must be sent to the Veteran to inform him/her of a proposed change in his/her benefits, if the source of information is received from a third party. The letter should advise the Veteran of the information received, explain the effect it may have on his/her benefit and allow the Veteran to offer evidence or argument that shows why the proposed action should not be taken.

- (b) Veteran

A notification for the adverse action must be sent to the Veteran to inform him/her about the change in his/her benefits, if the source of information is the Veteran. A notice of proposed adverse action is required. The letter should explain that the information he/she submitted is affecting his/her entitlement and the extent of the effect.

For more information on the right to notification, see 38 CFR 3.103(b)(2) and 38 CFR 21.420.

- e. Adverse Actions that Do Not Require Prior Notification

The following instances do not require a notification prior to taking an adverse action. The case manager must take the adverse action immediately and send a written notice to the Veteran with a copy to his/her designated representative.

1. Subsistence Allowance Awards

- (a) Award Reduction, Suspension or Termination

Per 38 CFR 21.420, changes in training time do not require prior notification. The case manager must take the adverse action immediately upon notification of the change. However, the case manager must ensure that all necessary evidence and information from the Veteran and the facility have been reviewed before taking the adverse action.

- (1) If a Veteran notifies his/her case manager of a decrease in course credits with an official school document confirming the decrease and its effective date, the case manager must adjust the Veteran's award and inform him/her in writing of the reduction in the subsistence allowance (38 CFR 21.324(i)) and evidence to support mitigating circumstances. See M28R.V.B.8 for more information on mitigating circumstances.
- (2) If a Veteran notifies his/her case manager of a decrease in course credits without an official school document confirming the decrease and its effective date, the case manager must contact the facility to verify the change and its effective date, adjust the Veteran's award and inform the Veteran in writing of the reduction in the subsistence allowance. In addition, the case manager must ensure that the amended certification is obtained from the facility and filed in the Veteran's CER folder.
- (3) If a facility informs the case manager of a change in training time, with or without confirmation of a change from the Veteran, the case manager must adjust the Veteran's award and inform the Veteran in writing of the reduction in the subsistence allowance. In addition, the case manager must ensure that the amended certification is obtained from the facility and filed in the Veteran's CER folder.

(b) Terminating an Award Upon Notification of Death

A notice of termination of benefits is not required when VA receives evidence that the Veteran has died. Once a notice of death is received, the case manager must immediately terminate the award effective as of the date of the Veteran's death. See 38 CFR 21.324(b) and M28R.V.B.8 for additional information on this issue.

2. Scheduled Interruption

A scheduled interruption is not considered an adverse action if a case manager and the Veteran agree on the interruption of services and an anticipated date of the Veteran's return to or discontinuance of the rehabilitation program is determined. Since this is not considered an adverse action, a notification of interruption is not required.

The case manager must clearly document the reason for interruption and any expected outcomes or actions to be completed during the interruption period and the date of expected return or case closure.

### 3. Scheduled Rehabilitation

Rehabilitation is not considered an adverse action if the rehabilitation is a result of scheduled completion of the goals outlined in the Veteran's signed rehabilitation plan.

#### f. Adverse Actions that Require Prior Notification

##### 1. Benefit Changes Requiring a Notice of Proposed Adverse Action

Generally, the VA must send the Veteran and his/her designated representative (if any), a notice of proposed adverse action prior to taking any unfavorable action affecting the Veteran's benefit, including unscheduled interruption, rehabilitation or discontinuance of benefits and/or services.

###### (a) Unscheduled Interruption

An unscheduled interruption is considered an adverse action if a case manager is unable to locate the Veteran, he/she is not participating in his/her rehabilitation program and his/her return to the rehabilitation program cannot be established. The case manager must send the Veteran and his/her designated representative a notification prior to interruption of services.

###### (b) Discontinuance

The case manager must send the Veteran a letter notifying him/her and his/her designated representative of the interruption when discontinuance is anticipated and interruption of services is required. This notification is required prior to closing the Veteran's case.

###### (c) Rehabilitation

The case manager must send a notification to the Veteran and his/her designated representative when rehabilitation closure is a result of any of the following circumstances:

- The Veteran's pursuit of further education
- The Veteran's attainment of suitable employment in something other than the planned goal

- Third-party information is obtained with no verification from the Veteran

## 2. Procedures for Providing Notices of Proposed Adverse Action

- (a) The Veteran must be sent a notice of proposed adverse action, following guidelines specified in this chapter.
- (b) The proposed adverse action period must be established specifying that the Veteran must respond within 30 days before any adverse action is executed.
- (c) Information and/or evidence submitted by the Veteran, if any, during the proposed adverse action period must be responded to.
- (d) If the Veteran does not respond to the notification for the proposed adverse action, final notification of the decision advising the Veteran of the decision must be sent including how it affects his/her entitlement to further benefits, the effective date, the detailed reasons for the decision and his/her appellate rights.

## 3. Due Process Period

For a required prior notification, VA must allow at least 30 days for the Veteran to respond before finalizing the adverse action. If circumstances warrant, VA may exceed this 30-day period, but the due process may not exceed 60 days.

## 2.07 Veterans Claims Assistance Act of 2000, Public Law 106-475

### a. Background and Description of Public Law 106-475

Public Law 106-475, Veterans Claims Assistance Act (VCAA), was enacted on November 9, 2000. The VCAA is designed to make the VA benefits application and claims system more manageable for a Veteran and their family. The VCAA gives VA a clear duty to assist claimants in getting the information needed to obtain their benefits, such as medical exams and service records.

### b. Elements of the Veterans Claims Assistance Act (VCAA) Notification Letter

VCAA notification is sent only in cases in which VA is considering a denial of benefits sought. The VCAA notice must inform the Veteran of the following:

- Information or medical evidence needed to substantiate the claim
- Evidence and information to be obtained by the claimant
- Evidence that is VA's responsibility to obtain (VA is required to notify the claimant when it is unable to obtain the relevant records)

In cases where the evidence is sufficient to substantiate the claim and to grant the benefit sought, it is unnecessary to send the notification letter indicating what it takes to substantiate the claim.

## 2.08 Duty to Assist Criteria

### a. Duty to Obtain Relevant Federal Records

VA's duty to assist a Veteran includes developing an individual's file from all relevant records in the custody of a federal department or agency, including VA medical records, service medical records, Social Security Administration records or evidence from other federal agencies.

Relevancy is determined by what is being considered. The following are examples:

- If a case manager is considering a determination of infeasibility due to psychiatric or medical problems and the Veteran claims to be actively receiving treatment at a VA Medical Center (VAMC), the case manager must obtain copies of the treatment records from the VAMC prior to making a decision on infeasibility.
- If a Veteran with a 10 percent disability rating appears to have an employment handicap but no serious employment handicap (SEH) and the Veteran is trying to claim increased compensation, the case manager must review all relevant medical records related to the pending claim for an increase in compensation prior to making a decision on the issue of an SEH.

### b. Duty to Obtain Relevant Non-Federal Records

The VA's duty to assist also includes developing private medical records, employment records, state workers' compensation records, educational records or state rehabilitation agencies' records.

If necessary, the Veteran can authorize the release of existing records using VAF 21-4142 (see Appendix O, VA Forms) or in a form acceptable to the

person, company, agency or other custodian holding the records.

If the Veteran does not provide the necessary release, the Veteran can obtain and submit the identified records for consideration.

c. Refrain from or Discontinue Providing Assistance

VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

1. The claimant's ineligibility for the benefit sought because of the lack of qualifying service, lack of Veteran status or other lack of legal eligibility.
2. Claims that are inherently not credible or clearly lack merit.
3. An application requesting a benefit to which the claimant is not entitled as a matter of law.
4. The claimant's lack of cooperation in providing or requesting information or evidence necessary to substantiate the claim.